

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-7168

To be argued by
JOAN GOLDBERG

B

In The

United States Court of Appeals

For The Second Circuit

TEACHERS UNITED FOR FAIR TREATMENT,
KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET
GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH,
MARY McAULAY, JOSEPH McCURM, MAURICE
MENDOZA and PAMELA MARLAND,

Appellants,

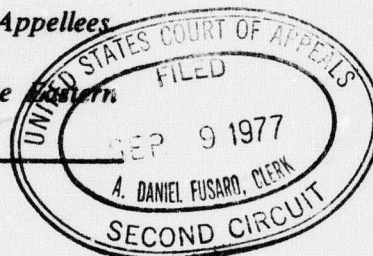
P/S

-against-

IRVING ANKER, Chancellor of the Board of Education of the
City of New York; ISIAH ROBINSON, President of the
Board of Education of the City of New York; and JAMES F.
RECTOR, a Member of the Board of Education of the City of
New York,

Appellees

Appeal from the United States District Court of the Eastern
District of New York.



BRIEF FOR APPELLANTS

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BY-LAWS OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK

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ARTICLE 78

CIVIL PRACTICE LAW AND RULES

SECTIONS 7801, et seq.....11 and 12

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
TEACHERS UNITED FOR FAIR TREATMENT,
KENNETH BOBROWSKY, BLOSSOM FOGEL,
HARRIET GREENBAUM, LaFRANCES HILLS,
ALICE LUBITCH, MARY MCAULAY, JOSEPH
McCRUM, MAURICE MENDOZA and PAMELA
MARLAND,

Appellants,

-against-

IRVING ANKER, Chancellor of the Board
of Education of the City of New York;
ISALAH ROBINSON, President of the Board
of Education of the City of New York;
and JAMES F. REGAN, a Member of the
Board of Education of the City of New
York,

Appellees,

-----X
Appeal from the United States District Court
of the Eastern District of New York

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

Plaintiffs appeal from a judgment of the
United States District Court for the Eastern
District of New York, Mr. Justice Pratt, entered
March 8, 1977, granting defendants' motion for
summary judgment and dismissing the complaint.

QUESTIONS PRESENTED

1. Do plaintiffs have standing to sue?

(a) Does plaintiff organization have standing to bring this action for injury to itself and its members?

(b) Do the individual plaintiffs have standing to bring this action?

2. Are any of the individual plaintiffs' claims barred by the doctrine of res judicata?

3. Must an employee be terminated to have a property interest protected by the United States Constitution?

(a) Does an unlawfully given unsatisfactory rating that effects continued job retention and promotion give rise to an action for violation of constitutional rights?

(b) Does the failure to hold a hearing prior to sending a teacher for a psychiatric examination give rise to a claim for violation of an interest protected by the Constitution?

(c) Do the statutes and regulations deprive plaintiffs of their constitutional rights as alleged?

FACTS

Plaintiffs, an organization of approximately 125 teachers and nine individually named teacher-members brought this action for declaratory judgment and an injunction to enjoin certain sections of the Education Law of the State of New York and procedures promulgated thereunder by defendants on the grounds that they are unconstitutional either on their face or as applied and to obtain damages against the defendants individually for violations of the individual plaintiffs' civil rights under 42 U.S.C. Section 1983 in that they acted wilfully and in concert to cause injury and harm to plaintiffs through arbitrary and discriminatory work ratings, dismissals from their jobs, marking them psychiatrically unfit as well as depriving them of their reputations and in some instances, their livelihood. Defendants have acted under color of law in their official capacities.

For the purpose of defendants' motion all of the facts in the complaint must be accepted as true.

THE DECISION BELOW

The court considered each plaintiff individually without discussing the action for a declaratory judgment and dismissed this action as to each individual plaintiff on various grounds, discussed infra.

It is respectfully submitted that the court erred in so doing. Each of the plaintiffs has stated a claim upon which relief may be granted. Each of the plaintiffs has standing to bring this suit.

POINT I

AN ORGANIZATION WHOSE MEMBERS ARE
INJURED MAY REPRESENT THOSE MEMBERS IN
A PROCEEDING FOR JUDICIAL REVIEW.

In Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court upheld an unqualified acceptance of organizational representation. The court below erred in dismissing the action by plaintiff organization.

In an organizational representational suit the organization represents its members and stands in its shoes in the courtroom. The organization litigates and adjudicates its members' claims just as a guardian ad litem or a class representative adjudicates the claims of the represented youth or class member.

There are different kinds of organizational suits: suits in which the organization represents itself; suits in which the organization asserts the rights of others, and the organizational class action. There is a great deal of overlap in the instant suit. The organization obviously has its own interest to represent in this case, as well as the interests of its members.

The plaintiffs-appellants here united into an organization to fight collectively for their interests. The sole purpose of the

organization was to wage legal struggles against the Board of Education and its supervisors who were denying individual teachers their rights to due process and punishing them by preventing promotion, by marking them and declaring them to be mentally unfit, and by dismissing them without due process of law.

All the plaintiffs have standing to bring this suit. For a plaintiff to have standing, an injury in fact must be alleged and the interest involved must be arguably within the zone of interest to be protected or regulated by the statute in question. Association of Data Processing Service, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The real issue when standing is questioned is whether "the person whose standing is being challenged is a proper party to request an adjudication of a particular issue and not whether the particular issue itself is justiciable", Flast v. Cohen, 392 U.S. 83, 99, 100.

All of the plaintiffs have suffered injuries in fact and they are clearly the persons whose interests are to be regulated and protected by the statutes in question.

To cut off the organization's representative function at the courthouse door would be totally improper under the circumstances. See United Federation of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir. 1969). Where, as here, the organization's stake in the outcome is virtually identical to the members' stake in the outcome, the organization clearly has standing to sue. Moreover, prosecution by the organization is essential to assure that this action is zealously pursued.

As the Supreme Court stated in unqualifiedly accepting organizational representation in Sierra Club, supra, at page 739,

"the courts have over the years permitted organizations to sue as an entity where it is authorized to represent its members in legal actions."

See, e.g. National Motor Free Traffic Assn. v. U.S., 372 U.S. 246 (1963); International News Service v. Associated Press, 248 U.S. 215 (1918).

In some cases courts granted standing to organizations only when individual named members were joined in the action as well, e.g. Soap and Detergent Assn. v. City of Chicago, 56 F. RD 423 (N.D.Ill. 1972). Generally, however, having both the organization and the members named as plaintiffs makes no practical difference.

Thus, in Named Individual Members of the San Antonio Conservation Soc. v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971), cert. den., 406 U.S. 933 (1972), the organization dropped a lawsuit, but the fact that individual members had been named as plaintiffs allowed a minority faction to continue the action.

Nor is there a difference between incorporated and unincorporated association: the cases make no distinction. See Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970), cert. den., 401 U.S. 1010 (1971); Black Shear Residence Assn. v. Housing Authority, 347 F. Supp. 1138 (W.D. Tex. 1972).

In the 1950's and 1960's, the United States Supreme Court consistently gave standing to civil rights organizations to represent their members : NAACP v. Button, 371 U.S. 415 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

In the case of Warth v. Seiden, 422 U.S. 490 (1975), the Supreme Court held that:

"Even in the absence of injury to itself an association may have standing solely as the representative of

its members...The possibility of such representational standing, nevertheless, does not eliminate or attenuate the constitutional requirement of a case or controversy. See Sierra Club v. Morton, 405 U.S. 727 (1972). The association must allege that its members or any one of them are suffering immediate or threatened injury as a result of the challenged action as would make out a justiciable case had the members themselves brought suit. Id. at 734-741, 92 S.Ct. at 1365-9; 422 U.S. at p.

Plaintiff TUFT here has standing as a representative of its members. The requirements of a case or controversy have been met as several members of the organization have suffered injury and are suffering injuries, and others are now threatened with immediate injury. Furthermore, a justiciable case definitely exists as the members are capable of bringing suit on their own behalf, as is required by Warth, supra.

Judge Pratt asserted that there must be an injury to the organization distinct from that to its members. This statement is directly contrary to the case of Warth v. Seiden, supra, and to the clear language of the court in Sierra Club v. Morton, 405 U.S. 727 (1972). In that case, the plaintiff lacked standing because the members of the organization suffered no actual injury, nor was such actual injury threatened. Here, such injury to the members of the organization does exist. The court held in the Sierra Club that:

"... It is clear that an organization whose members are injured may represent those members in a proceeding for a judicial review."

In the case of Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975), the court held that:

"This Circuit has recognized that an organization is especially well suited to represent its injured members when representation of the interests is, as here, a primary reason of the organization's existence." Id. p.10.

Plaintiff TUFT exists and "was formed to aid its members who have been unfairly subjected to discipline at the grievance level, at hearings before the Board of Education, and through the arbitrary use of medical and psychiatric examinations." (A-32)

This suit was brought in furtherance of this purpose; no other course of action could so effectively perpetuate the purpose of the organization as legal representation.

POINT II

THE STATE COURT PROCEEDINGS THAT SOME OF THE APPELLANTS BROUGHT PRIOR TO THIS FEDERAL ACTION WERE SPECIAL PROCEEDINGS IN THE NATURE OF MANDAMUS AND DID NOT AND COULD NOT HAVE DETERMINED THE CONSTITUTIONAL ISSUES RAISED IN THIS FEDERAL ACTION.

First, those appellants who brought actions in the state court to set aside administrative determinations, did so on the grounds that they were arbitrary, capricious and unreasonable. These actions were "Article 78" proceedings pursuant to Sections 7801, et seq. of the New York CPLR. Section 7803 of the state statute limits application of the article as follows:

"The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at

which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

New York courts have held that such proceedings are not a proper vehicle to test constitutionality. Matter of Jerry v. Board of Education, 44 A.D.2d 198 (4th Dept. 1974); Robbins v. Police Pension Fund, 321 F. Supp. 93.

In the combined cases of Jerry v. Board of Education of the City School District of the City of Syracuse and Soda v. Christner, et al., 44 A.D.2d 198 (4th Dept. 1974), both plaintiffs, tenured teachers, in an Article 78 proceeding had claimed violations of the due process clause of the Constitution by defendant Boards of Education. The Appellate Division held, at page 202:

"Article 78 proceedings continue to be inappropriate vehicles to test (the) constitutionality...and respondents remedy is an action for declaratory judgment. Although it is true that CPLR 103 (subd. (c)) gives the court the power to treat an Article 78 proceeding as an action for a declaratory judgment, this power is conditioned on jurisdiction over the parties' (Matter of Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 458). Section 71 of the Executive Law and CPLR 1012 (subd. (b)) require that when the constitutionality of a state statute is in question, the attorney general shall be notified and he shall

be notified and he shall be permitted to intervene in support of its constitutionality. The failure to notify the attorney general precludes this court from determining the constitutionality of the relevant sections of the Education Law." (P. 203.)

In the case of Robbins v. Police Pension Fund, 321 F.Supp. 93 (1970), the plaintiff brought a prior Article 78 proceeding before bringing a 1983 action in federal court. The defendants contended that plaintiff's claim under 1983 was barred by the doctrine of res judicata. The court addressed the issue by initially stating that:

"...a judgment may be res judicata for matters actually presented as well as those which could have been presented (citations omitted). The issue therefore is whether plaintiff could have raised his constitutional objections in the Article 78 proceeding. Under New York law, a party cannot in a single proceeding rely upon a statute or retain benefits thereunder and also attack its constitutionality. The proper procedure would be to raise the constitutional issue in a separate declaratory action. (Citations omitted.).... Consequently, under the New York rule plaintiff could not have attacked in the Article 78 proceeding the constitutionality of the statutes on which he relied and sought benefits. Accordingly, the state court judgment cannot be given binding and conclusive res judicata effect in this court."

The plaintiff in Robbins was held not to be precluded from raising constitutional issues in his subsequent 1983 action.

In the case of Longarzo v. Anker, et al., 76 Civ. 2633 (S.D.N.Y. 1977), a teacher sued for damages under 42 U.S.C. 1983. The basis for his claim was that he was denied due process of law in connection with an unsatisfactory rating. Prior to his action in federal court he had brought an Article 78 proceeding in which the rating was reversed for defendants' failure to follow proper procedure. The decision was affirmed by the Appellate Division. In response to his 1983 claim the defendants contended that he was barred by the doctrine of res judicata and mootness. The court found such argument to be without merit, stating:

"The principal of res judicata applies to repetitious suits involving the same cause of action; Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948). The civil rights claim presented here was apparently raised in the state court ...However, because the federal suit is based on a separate cause of action, this raises a question of collateral estoppel rather than res judicata. See Lombard v. Board of Education of the City of New York, 502 F.2d 631, 637 (2nd Cir. 1974). The Second Circuit held in Lombard that '(a) plaintiff (is not) required

to make (a due process) attack in an Article 78 proceeding in the state court, for Section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process." Id. at 636.

The Lombard court went on to state, however, that:

"Where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment...the litigant has made his choice and may not have two bites at the cherry." Id. at 637.

Collateral estoppel (issue preclusion) though is inapplicable where the prior determination of the constitutional issues was dictum and not necessary to the decision, id. at 637. Finally, plaintiff could not have pursued his damage claim in the Article 78 proceeding.

The plaintiff's action in Longarzo was dismissed on other grounds.

Based on the above cases it is clear that the doctrine of res judicata is inapplicable as to these plaintiffs. Even where constitutional issues were raised in plaintiffs' briefs the courts involved did not base their decisions on constitutional grounds, and any reference to such was dicta. In addition, these plaintiffs

are asserting a claim for damages which they
were precluded from doing in the prior Article
78 proceedings.

POINT III

AN EMPLOYEE NEED NOT BE TERMINATED TO
HAVE A PROPERTY RIGHT THAT IS PROTECTED
BY THE CONSTITUTION.

Plaintiffs Bobrowsky and Marland were tenured teachers who were rated unsatisfactory and which unsatisfactory ratings were upheld by the defendant, Chancellor Anker. The procedure for review of this unsatisfactory rating does not afford the plaintiffs any protection of their right to due process in that there is no sworn testimony taken; there is no right to cross-examination, and the hearing officers are supervisors of the Board of Education.

The defendants argued and the court below held that there is no protected right or interest involved with respect to plaintiffs' unsatisfactory rating and that no due process procedural safeguards are required at a Section 105-a review. To support this view, the case of Board of Regents v. Roth, 408 U.S. 564 (1972), was cited. That case held that "a non-tenured university teacher could be denied the renewal of his contract at the end of the academic year without a statement of reasons or hearing."

It was admitted that "tenure is a property right, but the court held that tenure has not been

affected by an unsatisfactory rating." The court held that "plaintiff has no claim of entitlement to a satisfactory rating and therefore no property right and due process guarantees are involved."

This view of the reality of the situation totally distorts the nature of the property right involved and the effect of unsatisfactory ratings. The property right of the plaintiffs here is their right to continued employment as a teacher. A teacher who receives two unsatisfactory ratings must be brought up on charges that may lead to dismissal. Therefore, the giving of such a rating clearly affects a property right. The rating has a direct affect on whether or not the plaintiff will continue to enjoy such property. Furthermore, the case of Longarzo v. Anker, 78 Misc.2d 977 (1974), held that tenure status and wage affect liberty and are property, citing Roth to this effect.

In addition, the giving of such a rating without due process safeguards is tantamount to a deprivation of plaintiffs' "liberty" under the 14th Amendment. Such a rating is clearly a stigma. In Board of Regents v. Roth, supra, the Supreme Court held:

"Where a person's good name, reputation honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." at p. 573.

Certainly the rating of a teacher as unsatisfactory will harm his name and reputation and may have a severely negative effect on his career. The court in Roth found that Roth had not been stigmatized as:

"mere proof for example that his record in one job, taken along might make him less attractive to some other employment, would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty." p. 573-4, fn. 13.

For, in Roth, the non-renewal of the plaintiff's contract was not based on a charge of any kind. Indeed, the court stated that "had it done so this would be a different case", at p. 573, 574.

The case at hand is a different case. In every sense charges have been levelled at the plaintiffs, namely incompetence and serious failings as teachers.

Concerning an unsatisfactory rating of a probationary teacher, in Matter of Pall, N.Y.L.J., April 10, 1973, p. 20, col. 1, the court held:

"In the within proceeding the 'unprofessional attitude' ratings given petitioners which directly or indirectly

resulted in their services being terminated involve their reputations and good names as teachers and fall within the concept of liberty as enunciated in the Roth case.

* * * *

"The court in the Roth case left open the type of hearing that should be afforded a non-tenured teacher whose liberty and property rights had been endangered. However, a careful reading of the Roth case indicates the court was thinking in terms of a full prior hearing. The court used phrases such as refutation of charges, right to full prior hearing, and right to vindication. Accordingly, this court is of the opinion that the petitioners are entitled to a due process hearing as spelled out in Goldberg v. Kelly, (supra)."

If the plaintiff were to seek other employment, there is no question that such a rating would foreclose many employment opportunities.

A tenured teacher is entitled to full due process where his property and liberty rights may be affected adversely, and therefore a claim for relief is stated as to these plaintiffs' unsatisfactory ratings.

The Supreme Court and other courts have consistently recognized this principle:

"Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."
Dixon v. Alabama State Board of Education, 295 F.2d 150, 155 (5th Cir. 1960), cert. den., 368 U.S. 930.

This principle has resulted in the requirement that procedural due process be had in any proceeding where factual or legal issues are determined, with the consequence that substantial personal interests are affected. See Goldberg v. Kelly, 397 U.S. 254; Jenkins v. McKeithen, 395 U.S. 411; Willner v. Committee on Character and Fitness, 373 U.S. 96; Greene v. McElroy, 360 U.S. 474 (1959); Morgan v. United States, 304 U.S. 1.

Fair procedures, insuring reliable administrative determinations, are a constitutional right. There is no governmental program, license or benefit considered such a "matter of grace" that due process procedural standards may be disregarded. See Ohio Bell Telephone Co. v. Republic Utilities Commission, 301 U.S. 292; Schroeder v. New York, 371 U.S. 208, 212; Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967); Hornsby v. Allen, 362 F.2d 605, 608 (5th Cir. 1964); Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir. 1968); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968); Freedman v. Maryland, 380 U.S. 51; Wong Yung Sung v. McGrath, 339 U.S. 33; Simmons v. United States, 348 U.S. 397; Gonzalez v.

Freeman, 334 F.2d 570, 576, 580 n. 21 (D.C. Cir. 1964); Bratton v. Chandler, 260 U.S. 110; Nugent v. United States, 346 U.S. 1; Rios v. Hackney, 294 F.Supp. 885 (N.D. Tex. 1967); United States v. St. Clair, 293 F.Supp. 337 (E.D.N.Y. 1968); Van Alstyne, The Demise of the Right - Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

Thus, although the procedure in 105-a does not purport to dismiss a tenured teacher, nevertheless the necessity to have the opportunity to defend against an "unsatisfactory" rating is clear. Plaintiffs Marland and Bobrowsky were wrongfully denied their constitutional protections in the court below.

POINT IV

THE RIGHT TO BE FREE FROM THE STIGMA
OF MENTAL UNFITNESS IS A CONSTITUTION-
ALLY PROTECTED RIGHT.

Section 2568 of Educational Law provides that a teacher must undergo psychiatric examination to determine mental competence to perform his or her duties on the basis of a written letter by a Principal.

The United States Court of Appeals for the Ninth Circuit in Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973), upheld an injunction requiring the governing board members of San Matteo College to reinstate plaintiff Stewart as an English instructor because he was denied due process. Stewart was ordered for psychiatric examination after he made critical comments against the college administration. The Court held that the Board had to give Stewart reasons for the examination, notice of a hearing to determine the validity of such order, and a proper hearing. The Court held that:

"a hearing is required when any charge is made that might seriously damage (a person's) standing and associations in his community...for where a person's good name, reputation, honor and integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential."

Board of Regents v. Roth, 498 U.S., at 454.

The Court reasoned that the order to report for psychiatric examination implied that there existed both reasonable grounds for the order and mental unfitness for the job. For these reasons, the hearing was required to prevent oppressive results.

A number of principals have made a regular practice of requesting psychiatric examination of teachers who have been critical of the school, or who have fought for the rights of students, or who have been assertive in their efforts to provide creative opportunities for problem students within the schools, which examinations have almost universally resulted in a finding of mental incompetence or unfitness for duty, as with plaintiff Hills.

Obviously, such conduct on the part of the Board of Education is outrageous, a violation of privacy and a violation of due process of law, and can only be prohibited by declaring this section of the law unconstitutional.* By sending plaintiff Hills to report for psychiatric examination, her principal succeeded in dismissing her without a hearing, without due process of law requiring her reinstatement.

* According to the Chancellor, between July 1, 1970 and June 30, 1971, 117 teachers were referred for psychiatric exams; between July 1, 1971 and June 30, 1972, 127 were referred; between July 1, 1972 and June 30, 1973, 142 were referred. This number also is on the increase.

POINT V

THE STATUTES AND REGULATIONS PROVIDING FOR DISMISSAL OF TENURED TEACHERS DENY THEM DUE PROCESS OF LAW.

Points III and IV deal with the unsatisfactory rating and the psychiatric examination. This Point deals with dismissal, grounds for dismissal, and procedures for a hearing. Five of the plaintiff teachers have been, or may be, dismissed under these provisions. They, therefore, have standing to contest their validity.

(a) Section 2590-J of the Education Law and Section 105 of the By-Laws of the Board of Education are unconstitutionally vague and overbroad.

The provisions of paragraph 7(b)(3) of Section 2590-J of the New York State Education Law and subdivision 2(c) of Section 105 of the By-Laws of the Board of which authorize dismissal of a teacher for "conduct unbecoming his position or conduct prejudicial to the good order, efficiency or discipline of the service" are unconstitutional. This language is vague and overbroad, and those sections of the statute and regulations which prohibit such conduct are unconstitutional. Winter v. New York, 333 U.S. 507, see Bachellar v. Maryland, 397 U.S. 564 (1970); Stromberg v. California, 283 U.S. 359 (1931).

The fact that the Board has set forth specifications detailing the offense charged does not validate the statute. The statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Conally v. General Construction Co., 269 U.S. 385, 391 (1926), for a statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Ibid. Furthermore, the absence of a narrowly drawn statute means a lack of guidance "to those who seek to administer the law". Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968), thus, allowing the exercise of rights to depend upon the "uncontrolled will of an official". Staub v. Baxley, 355 U.S. 313, 322 (1958).

The need for precision is extremely important here for the statute is being applied to conduct, and in this area "precision of regulation must be the touchstone". NAACP v. Button, 371 U.S. 415, 438 (1963), and unless there be "narrow, objective or definite standards". Shuttleworth v. Birmingham, 394 U.S. 147, 151 (1969), the statute is unconstitutional.

Tested by these standards, the clause is clearly unconstitutionally vague on its face. The words "good order" and "discipline" give no meaningful guide as to the type of conduct being proscribed. Indeed, the Supreme Court's decision in Shuttleworth v. Birmingham, supra, is dispositive of the issue. There, the Court struck down a city ordinance which gave the City Commission power to refuse permits on the grounds, inter alia, of "public welfare", "decency", "good order", "morale or convenience", saying that this ordinance.

"...conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade', 'procession', or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morale, or convenience.'" 394 U.S., at 150.

A similar result was reached in Staub v. Baxley, supra, where the Court held that a city ordinance, granting the Mayor power to refuse a permit based upon the application's "effect upon the general welfare" of the citizens of the city, lacked "definite standards or other controlling guides", and, thus made "enjoyment of speech contingent upon the will of the Mayor and Council of the City." 355 U.S., at 322, 325.

The lack of an ascertainable standard of conduct in the regulations grants a blanket authority to the Board of Education to define the conduct it encompasses. Nowhere is the vice of vagueness more apparent than in a case where the Board of Education used its power to decide that Ms. Fogel's conduct must result in dismissal. Yet, vagueness in academic regulations has been consistently held invalid. Soglin v. Kaufman, 418 F.2d 163 (7th Cir. 1969); Rasche v. Bd. of Trustees of Univ. of Ill., *supra*; Linwood v. Bd. of Education, City of Peoria, School Dist. No. 150, Ill, 463 F.2d 763 (7th Cir. 1972); Burton v. Cascade School District Union High School, 353 F.2d 901 (7th Cir. 1970) (police department regulation).

The lack of pre-existing rules defining proscribed conduct has been held fatal to official sanctions imposed because of the conduct of the individual involved and should be fatal here. Soglin v. Kaufman, *supra*, Hostrop v. Bd. of Junior College Dist No. 515, *supra*; Linwood v. Bd. of Ed., City of Peoria, Sch. Dist. No. 159, Ill, *supra*; Fujishima v. Bd. of Education, 460 F.2d 1355 (7th Cir. 1972); Lucia v. Duggan, 303 F.Supp. 112 (Mass.1969).

This case is unmistakably governed by the principle that:

"Whenever a governmental body acts so as to injure an individual, the Con-

stitution requires that the act be consonant with due process of law." Dixon v. Alabama State Board of Education, 295 F.2d 150, 155 (5th Cir. 1960), cert. denied, 368 U.S. 930.

The Supreme Court and other federal courts have recognized this principle on many occasions in enforcing the demand for procedural due process in any proceeding where factual or legal issues are determined, with the consequences that substantial personal interests are affected. See Goldberg v. Kelly, 397 U.S. 254; Jenkins v. McKeithen, 395, U.S. 411; Willner v. Committee on Character and Fitness, 373 U.S. 96; Greene v. McElroy, supra; Morgan v. United States, supra.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit

the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The Education Law does not afford the teacher opportunity to choose "between lawful and unlawful conduct". since it does not put him on notice as to what is "unlawful". It can only be applied on "ad hoc and subjective basis", since the trial examiner is not put on notice as to what is malum prohibitum, and so, he is free to interpret otherwise innocent behavior that has offended hierarchy's sensitivities. It inhibits the dissemination of ideas, a variety of which are the key to any true educational system, for fear that their utterance might prove unpopular, and thereby punishable. Cf. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733.

"The overbreath of the section making all persons accountable to some unspecified inquirer is blatant...A faulty law cannot be validated by reliance on official good faith in employing it only to protect the public." Scott v. District Attorney, Jefferson Parish, State of Louisiana, 309 F. Supp. 833 (E.D. La. 1970).

Fair procedures, insuring reliable administrative determination, are a constitutional right. There is no governmental program, license, or benefit considered such

a "matter of grace" that due process procedural standards may be disregarded. See Ohio Bell Telephone Co. v. Republic Utilities Commission, 301 U.S. 292; Schroeder v. New York, 371 U.S. 208, 212; Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967); Hornsby v. Allen, 362 F.2d 605, 608 (5th Cir. 1964); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1963); Freedman v. Maryland, 380 U.S. 51; Wong Yong Sunk v. McGrath, 339 U.S. 33; Simmons v. United States, 348 U.S. 397; Gonzales v. Freeman, 334 F.2d 570, 576, 580 n.21 (D.C. Cir. 1964); Bratton v. Chandler, 260 U.S. 110; Nugent v. United States, 346 U.S. 1; Rios v. Hackney, 294 F.Supp. 885 (N.D. Tex. 1967); United States v. St. Clair, 293 F. Supp. 337 (E.D.N.Y. 1968); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The right of a tenured teacher to continue employment is a valuable right which should not be removed without a fair hearing at which due process standards are adhered to.*

*All teachers, no matter how many years of service they have, and no matter what the reason for discharge, lose their pension rights when dismissed. Some teachers are offered the option of resigning to preserve their pension rights. In such case, the teacher forfeits the right to appeal. It is interesting to note that police officers must be convicted of a crime to lose their pensions.

(b) The procedures, under which a teacher may be dismissed, are so blatantly unfair as to deny due process to said teachers.

There is no question that the continued employment of a teacher is protected by the due process clause. Slochower v. Board of Education, 350 U.S. 551; Weinman v. Updegraff, 344 U.S. 183; Board of Regents v. Roth, 408 U.S. 454; Perry v. Sinderman, 408 U.S. 593.

The Supreme Court has stated that:

"...when a State seeks to terminate (a protected) interest, ...it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." Bell v. Burson, 402 U.S. 535. Snead v. Dept. of Social Services, 355 F. Supp. 764 (S.D. N.Y. 1973); Rohe v. Froehke, 500 F.2d 113 (2d Cir. 1974); Buck v. Board of Education, 71 C. 954 (E.D.N.Y. Dec. 2 1974).

Section 105 of the By-Laws of the Board of Education and New York Education Law Section 2590-J, both provide for a hearing - the question is whether the procedures set forth satisfy the "fair hearing" requirement of the due process clause.

In the constantly expanding body of case law dealing with what constitutes a fair hearing, it is apparent that, before a teacher can be punished, dismissed, or

transferred, he/she must be given:

1. Written notice of the charges designating the specifications of the violation.
2. A hearing before an impartial hearing officer, at which there is the right to cross-examine the accusers and call witnesses in rebuttal.
3. A written record of the hearing decision, the reasons therefor, and the evidence relied upon.
4. The decision must be based on substantial evidence.
5. There must be a meaningful right to appeal.
6. Right to counsel.

It is difficult to imagine a more "grievous loss" than the right to earn a living in one's chosen profession (or in any profession, or position, after dismissal), and deprivation of pension and other benefits. It seems evident that the fair hearing required by the Constitution before depriving a teacher of the right to teach should include all the above requirements.

POINT VI

THE COMPLAINT STATES A CLAIM UPON
WHICH RELIEF MAY BE GRANTED.

The standard that should be applied in reviewing the sufficiency of a complaint is limited to the criteria stated in the recent case of Scheuer v. Rhodes, 416 U.S. 432. In that case, the Supreme Court held that:

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably....A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." p. 436.

Based upon the above stated test, this complaint should not be dismissed. The complaint sets forth a claim for relief and the only questions are are those the facts? The plaintiffs claim that the defendant officials used their power and positions to harass and stigmatize the plaintiffs.

The Supreme Court in the case of Monroe v. Pape, 365 U.S. 167, held that the purpose of Section 1983 was "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position", p. 192. The civil rights statutes are intended to enforce provisions of the 14th Amendment against those who carry a badge of authority of a state and represent it in some capacity whether they act in accordance with their authority or misuse it. Monroe v. Pape, supra, at p. 171, 1972.

The rights to which plaintiffs have been deprived by the defendants are protected by the 14th Amendment. Some of the plaintiffs were deprived of their jobs without due process of law. Other plaintiffs studied for, trained for the profession of teacher and were denied licenses without due process of law. Both wages and jobs affect liberty and are considered property to be protected by the court. Board of Regents v. Roth, 408 U.S. 564. In that case, the Supreme Court held "when protected interests are implicated, the right to some kind of prior hearing is tantamount", at p. 569. Plaintiffs all complain that their professional reputations were seriously impaired by the actions of the defendants, that

each statute, by-law or rule or regulation concerning the disciplining of teachers deprives them of a fair opportunity to contest such decision. The Court in Roth, supra, held "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, then an opportunity to be heard is essential."

Others of the plaintiffs were rated unsatisfactory as teachers, which is a deprivation of a liberty right guaranteed by the 14th Amendment and is protected by the Constitution because it relates to reputation.

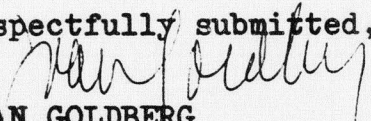
Others were ordered for physical and/or psychiatric examinations by defendants which resulted in a stigmatization that deprives those plaintiffs of a liberty right guaranteed by the 14th Amendment.

Thus, all of the claims set forth in the complaint are matters over which this court has subject matter jurisdiction and over which relief may be granted.

C O N C L U S I O N

FOR ALL THE FOREGOING REASONS, THE
DECISION BELOW SHOULD BE REVERSED.

Respectfully submitted,


JOAN GOLDBERG
Attorney for Appellants
275 Madison Avenue
New York, New York 10016

Dated: New York, N.Y.
September 6, 1977

COURT OF APPEALS
SECOND CIRCUIT

TEACHERS UNITED FOR FAIR TREATMENT,
KENNETH DOBROWSKY, BLOSSOM FOGEL, HARRIET
GREENBAUM FRANCES HILS, ALICE LUBITCH,
Appellants.

- against -

IRVING ANKER, chancellor of the Bd of Ed of
City of N.Y. SAIAH ROBINSON,
Pres. of the Bd. of Ed. of N.Y.
Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

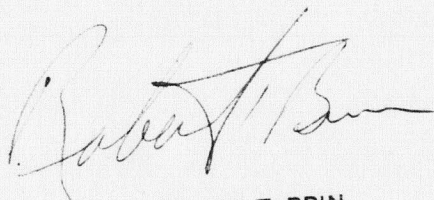
That on the 9th day of Sept, 19 77 at Municipal Building
New York, New York

deponent served the annexed
Brief

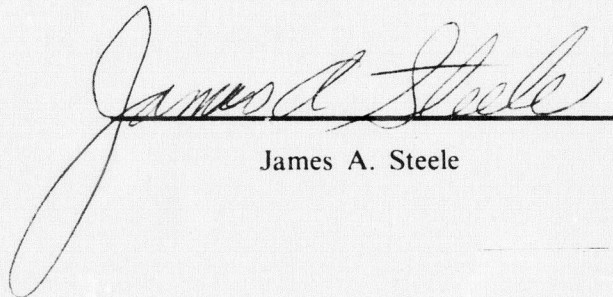
W. Bernard Richland upon
Corp. Counsel

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 9th
day of Sept., 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



James A. Steele